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BEFORE THE

COMMITTEE AND SUBCOMMITTEE ON THE PUBLIC LANDS

HOUSE OF REPRESENTATIVES

MARCH 20, 1912

ON

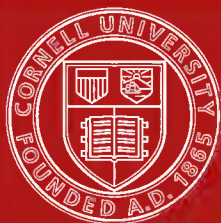
H. R. 21954

STATEMENT BY

HON. JOHN B. CURTIN

OF SENORA, CAL.





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WESTERN BOUNDARY OF YOSEMITE NATIONAL PARK.

COMMITTEE ON THE PUBLIC LANDS,
HOUSE OF REPRESENTATIVES,
March 20, 1912—11 o'clock a. m.

The committee this day met, Hon. Edward T. Taylor (chairman) presiding.

THE CHAIRMAN. I may say, gentlemen of the committee, that the Secretary of the Interior telephoned to my office about an hour ago and said that he would have up here this morning a supplemental report, or a supplemental letter, on the three-year homestead bill which we would like to have to consider before we take up the bill. I expected to have them here now.

MR. RAKER. There are seven or eight members of the committee present now, and as Senator Curtin is here and wants to make a statement in relation to bill H. R. 21954, which the reporter can take down, I would like to have him given that opportunity while we are waiting for this other matter. That is with reference to bill 21954.

STATEMENT OF SENATOR JOHN B. CURTIN, OF SENORA, CAL.

MR. CURTIN. Mr. Chairman and gentlemen, I will endeavor to be just as brief as I can. The purpose of this bill is to change the western boundary line of the Yosemite National Park, and exclude therefrom certain portions of territory included in the Yosemite National Park, bringing that land under the jurisdiction of the Interior Department.

THE CHAIRMAN. What is the object of that bill?

MR. CURTIN. The purpose of this bill, gentlemen, is to change the western boundary of the Yosemite National Park, excluding therefrom a certain portion of that territory, bringing that land under the jurisdiction of the Agricultural Department—the one being under the control of the Agricultural Department and the other one, the park, being under the control of the Interior Department. The park was created October 1, 1890, by the ceding of lands, and three times since that time the Government has recommended the change of those boundaries, so as to get them to conform to natural boundary lines. You may notice here the yellow lines, which were the boundary lines of the original park. They changed those lines and brought the boundary line in here [indicating]. They changed the boundaries on the eastern side to follow the natural boundaries, and they did the same on the southeast side, and on the southwest side in here [indicating] throughout all of that land.

MR. RAKER. The red line is the present boundary?

MR. CURTIN. The red line is the present boundary as you can see that line, and then there are owners of private lands there. Look at that for a boundary line. They are in the forest reserves, and the Forestry Service desires to have this change made.

Mr. PICKETT. What do you want to change?

Mr. CURTIN. This is a corresponding map. They are both made by the Government, the one showing the land sectionized, and the other not.

Mr. PICKETT. Where is it now?

Mr. CURTIN. It is now on the black line this way [indicating]. The reason, you understand, is to follow the natural boundary line, and nothing would interfere with that. This is not the national forest. All outside of these heavy blue lines is not national forest. Originally it was in the park, as you can see, but owing to the fact that there were private holdings there the Government recommended the change and threw them out. We want to follow this line [indicating], the natural boundary line.

Mr. PICKETT. How would that bring about the change?

Mr. CURTIN. It is only a change in the jurisdiction. That is all. This blue mark [indicating], right here, on this map, the northeast quarter of section 23, on which there is a grove of big trees, and on the southeast quarter of the southeast quarter of section 7, on which there is also a grove of big trees, as indicated on the map. There are private parties holding this land inside of this crooked line [indicating]. The rules of the National Forestry Service are entirely different from those applying elsewhere, and the owners of land in the national forest can not get on them.

Mr. PICKETT. Do you want to throw more of it into the national forest?

Mr. CURTIN. Yes, sir. The Secretary of the Interior stated that the only objection was that it wouldn't leave the body of the land compact; but you can see it can not be held compact, because this is all private property [indicating]. As it exists now, the Government can not fence its own lands, because it can not get on that patented land. It can not put a fence on my land.

Mr. PICKETT. Does this involve getting that private land?

Mr. CURTIN. It was all patented years ago.

Mr. PICKETT. Is it going to be acquired by the Government in any way?

Mr. CURTIN. It would be against all Government policy to buy that land.

Mr. FERGUSON. The idea is to place the owners of these private lands under the jurisdiction of the Forest Service, rather than under the jurisdiction of the Interior Department?

Mr. CURTIN. Yes, sir.

Mr. RAKER. So that you will be permitted to use this land for grazing purposes? That is the condition, isn't it?

Mr. CURTIN. That is the condition exactly.

Mr. MONDELL. The Government couldn't set aside any land for that purpose if it didn't have any land to graze upon?

Mr. CURTIN. This land in here is land which doesn't belong to the park at all, which has no scenic beauty whatever.

The CHAIRMAN. Couldn't it even be homesteaded?

Mr. CURTIN. No, sir.

The CHAIRMAN. I know, but the way it is now, couldn't it be homesteaded?

Mr. CURTIN. The land isn't worth it.

Mr. MONDELL. What is the present boundary of the National park?

Mr. CURTIN. This heavy blue line.

Mr. MONDELL. This heavy blue line here doesn't go up there at all?

Mr. CURTIN. It goes right along up there.

Mr. MONDELL. You haven't carried it far enough.

Mr. CURTIN. I didn't carry it because this is the only part in controversy [indicating]. Here is the balance of it. This is the latest map. That includes this, and excludes this in here [indicating].

Mr. MONDELL. That is now——

Mr. CURTIN. The Yosemite National Park, in those red lines.

Mr. MONDELL. You are carrying out here the area of the proposed exclusion?

Mr. CURTIN. And throwing it into the National forest, in which this excluded land was placed.

Mr. MONDELL. On the theory that it contains no scenic beauty?

Mr. CURTIN. Yes, sir; on that theory, and on the further theory that the Forestry Department in here, and the Interior Department, have these rules whereby, if any person gets over from the forest on to the park land, they are immediately notified that they must be excluded. The Forestry Department does not recognize private ownership at all, and the very moment one gets in there they are excluded. And the result was that I had to go to the Supreme Court of the United States in order to protect my rights, and I beat the Government in that suit. I have the decision here with me.

Mr. MONDELL. Why were the boundaries of the national forest originally carried along these irregular lines to the east?

Mr. CURTIN. For the reason that this mark here indicates the northeast quarter of section 23, which comprises the Mercedes grove of big trees.

Mr. MONDELL. Belonging to the Government?

Mr. CURTIN. Belonging to the Government; and this other one, 40 acres in section 7, that is the Tuolumne grove of big trees. Aside from this, you will notice that that is all patented. The public road passes through both of those sections. The Government can not fence the land, because it can not follow those park lands.

Mr. MONDELL. The Government could fence that 160-acre tract?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. And that 40-acre tract?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. That is all it has?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. So that the Government could fence its land?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. What you mean is the Government couldn't fence in the park boundaries?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. Could the Government fence public land with a highway running through it?

Mr. CURTIN. It would have to put a public fence on each side, because the road cuts through the grove.

Mr. FERGUSSON. Is the Agricultural Department and the Interior Department in favor of this?

Mr. CURTIN. The Agricultural Department is.

Mr. FERGUSSON. How about the Interior Department?

Mr. CURTIN. I haven't taken it up with the Interior Department. You can not fence that land in there owing to the steepness of the hills. I call your attention to the report here by the acting superintendent of the Yosemite National Park to the Secretary of the Interior for the year 1908, in which he uses this language, and it is repeated right through year after year.

Mr. RAKER. On what page?

Mr. CURTIN. On page 8:

It is again recommended that the western boundary of the park be fenced, using therefor barbed wire and international steel posts. There has been no trouble this year from trespassing of cattle or other stock, except upon a portion of the western and southwestern boundary. It is practically impossible to protect the entire western line with the few outposts that can be established, and there result some friction with owners of cattle that are permitted to graze in the forest reserve immediately up to the boundary, but are not allowed to graze within the park. All of this friction could be easily avoided by the construction of a fence as suggested. It would require about 50 miles of fence, which could readily be put up at a cost of not more than \$10,000; and it is believed that this would be one of the wisest measures that could be adopted for the prevention of friction and misunderstanding with cattlemen.

That was the report in 1908, and he repeats the same proposition again in almost the identical language in 1909, and the same again in 1910, and then he doesn't make the recommendation in 1911.

Mr. PICKETT. Have you a letter here from the Department of Agriculture?

Mr. CURTIN. No; I have not.

Mr. PICKETT. Where is that report?

Mr. CURTIN. There has been no report in writing. I went with Capt. Adams himself to the Interior Department, to the Assistant Secretary, and they said in my presence that there is no objection to this part of it.

Mr. PICKETT. Do they confirm that by letter to the committee?

Mr. CURTIN. I think there is no question about that. I think the only thing is that they do not like to be put in the attitude of quarreling with the Interior Department. Capt. Adams went over there with me to interview the Assistant Secretary.

Mr. PICKETT. What does the Interior Department say?

Mr. CURTIN. That the matter would undoubtedly be referred to Maj. Forsythe, superintendent of the park, for his report thereon.

Mr. PICKETT. And what would he say about it?

Mr. CURTIN. I talked with him just before I left—over the telephone—and he said that he had a great deal of sympathy for us people endeavoring to settle this friction up there. The cattlemen referred to—they are all small holders in there that own this land—and there is constant friction there between the Department of Agriculture, through the Forest Service, and the Interior Department. In other words, if a soldier on watch there finds one animal on this land he reports them as being inside of the park. They went so far as to deny me access to that land at all, and I brought suit and won it, and the holding was that the Secretary of the Interior has no power to interfere with the private lands.

Mr. MONDELL. You say that if any change is to be made, the boundary lines should follow the natural boundaries?

Mr. CURTIN. The natural boundaries.

Mr. MONDELL. As fixed by the topography of the country?

Mr. CURTIN. Yes, sir. This much is not, but my purpose in doing that was if we had to go to the extreme of doing it, it is our desire to

keep away from the Yosemite National Park. The original, you will notice that you strike Cascade Creek. It is a rough creek, and nothing can get across excepting in one place. Then you strike the boundary line here, which is a natural watershed [indicating]. And this is a high precipitous mountain, over which nothing could go [indicating]. And following again you will notice the watershed forms the natural boundary. This is probably the natural boundary in there [indicating], and that is what they did here [indicating].

Mr. RAKER. Is there any scenic beauty in that particular part?

Mr. CURTIN. Absolutely none, and I say that without fear of contradiction of anyone, but no human being has gotten into that country, except one or two of us going in there to see if anything had strayed in there; there is no fishing, there is no hunting, or timber, or anything else in here. Simply rough mountains and ridges in there.

Mr. RUBY. What territory are you referring to now, when you say there is nothing in it?

Mr. CURTIN. This territory here [indicating]. There [indicating] gentlemen, is where the scenery is, and that is the grandest scenic beauty I ever saw.

Mr. RAKER. To the east and south?

Mr. CURTIN. I don't think there is any spot which for scenic beauty can excel that, in the forest reserve. There is no desire to do anything except for the purpose of ending the friction.

I desire to call your attention as to how the superintendent of the park had reported upon this matter to the Secretary of the Interior, which is made a part of this decision here rendered on November 20, 1911. The Supreme Court quotes from his language:

The following from the report of the superintendent of the park to the Secretary of the Interior for the year 1901 was put in evidence:

"After due consideration, based upon the best evidence I have been able to obtain, I can see no objection to property owners, and those holding leased land within the park limits grazing cattle near their own premises under the supervision of the park authorities."

That simply shows you that there is nothing there to injure the Government. The soldiers recognize no man's patent, and consequently they take everything they can from him. They did that with me, and I said that I would fight it out.

The concluding language of the court is as follows:

We, however, rest our decision on the ground of the want of power of the Secretary or the superintendent to limit the uses to which lands in the park held in private ownership may be put.

Mr. MONDELL. All of this land here [indicating] is under private ownership, save and except the two groves of 160 acres and the other of 40 acres and two other little tracts?

Mr. CURTIN. Yes, sir. This is my own property here. It was State school land, but it is patented land now.

Mr. VOLSTEAD. Is there any mineral on this land?

Mr. CURTIN. Not that I am aware of. I don't think there is a mining claim of any kind; I don't think there is any holding of any kind in there except homesteads and timber claims.

It has been suggested that there may be some desire on the part of the Government to buy this land from us. Why should the Government, after we have waited for 20 years, buy that land, when they are selling this very property in the Forest Department? That is all

mature timber, and the Forest Department advertises for sale because of its maturity.

Mr. PICKETT. I do not understand just what land you own there.

Mr. CURTIN. That is here, section 16, this red here in section 28. Then all this land out in here, yellow.

Mr. MONDELL. The various private owners own all the land shown in coloring?

Mr. CURTIN. Yes, sir.

Mr. PICKETT. The purpose of it is to put that portion of it within the forest reserve?

Mr. CURTIN. Yes, sir; and the bill provides, in its last section, that the big-tree groves are still retained in the park and subject to all of the rules just as they have been.

Mr. PICKETT. It looks to me as if it properly belongs in the forest reserve. It doesn't look to me as though they ought to have private lands in the public parks.

Mr. CURTIN. As a consequence they can not get over the line.

Mr. RAKER. What is the real crux of the difficulty? Why do you want to ask this land to be excluded from the national park and put into the national forest? Just explain that to the committee.

Mr. CURTIN. There are two reasons. First, it is impracticable to fence this land according to the legal subdivisions. Second, if we should go to the enormous expense of doing that, the Government would not get what it desires, because we would have fenced it all in.

Mr. MONDELL. What advantage does the National Government obtain from the national-park standpoint in having that area, practically all of that private ownership, within a national park?

Mr. CURTIN. Absolutely none whatever. The Government isn't injured one iota by this change, but on the contrary it is benefited in this, that it gives the Forest Department control of that, and a rental would be obtained, and there would be no friction between the two departments.

Mr. MONDELL. Now, that part seems to be very clear—sections 13, 18, 17, and 23. Now, as to excluding all of that considerable area on the middle and south forks of the Tuolumne—of course personally it is immaterial to you just how much is excluded there, providing you get far enough back not to interfere with the private holdings?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. Of course we don't want to get far enough back to exclude from the park any ground that is useful for national park purposes?

Mr. CURTIN. I concur with you on that.

Mr. MONDELL. You feel confident that the natural drainage and following the tops of the mountains here would serve the purpose of the Government better than any other lines that could be drawn?

Mr. CURTIN. Yes, sir; because there is no scenic beauty within here whatever. Yes, sir; so far as I am concerned, if it followed the township lines in here it would be all right, but we have desired to avoid this friction and to run this along the natural boundary. If we failed to do that, we were going to fence that ourselves. It will be utterly impossible to maintain it there [indicating], because the snow at that point gets 18 to 16 feet deep.

Mr. MONDELL. The north and south line between townships 20 and 21 would, of course, accomplish all that you have proposed, but

you feel that the further exclusion following the natural drainage lines would be more advantageous?

Mr. CURTIN. It would; but failing in that we will have to do the other, but it is utterly impossible to keep a fence up there.

In conclusion, I want to call your attention to the language which I referred to a minute ago of the acting superintendent of the Yosemite National Park in his report to the Secretary of the Interior in 1911, where he says, on page 6 of his report:

No sheep or stock have been herded through the park, and there has been much more trouble with cattle and friction with cattle owners on the west side than in previous years. The few cattle that drifted in from the forest reserve on the west side were quickly removed, but the owners were nevertheless reported to the forest supervisor for violation of the conditions of their grazing permits.

According to the present rules, if a man gets permission from the Forest Service to graze his cattle, if those cattle get into the park the park authorities notify the Forest Service and they must revoke the permit. A year ago last summer there was an immense fire which broke out here among the big trees, and I sent my men to stay with that fire until it got out. My crew of men put that fire out. They worked there with the soldiers, but they did the biggest part of it, and got the fire out. While they were doing that, the superintendent telephoned to me that some cattle of mine were seen in the park and that I must get them out. I asked him how it was that when my men had been there for 48 hours fighting a fire for the Government, how it was that I should be so treated when my animals had accidentally strayed into the park. He said it was absolutely wrong, and he so reported to the superintendent of the park.

That is the treatment we get in there, and for that reason we are desirous of ending this friction between the two departments. There are only a small number of men in there, five or so; they are all poor men, and that this is their way of making a living.

Mr. MONDELL. There is no justification for returning considerable areas of lands in our national parks which do not contain features of scenic beauty, or which is not joined by natural boundaries to land that has scenic beauty. In the second place, if it is such land, all private holdings should be eliminated from our national park.

Mr. CURTIN. I think so, too. But that land that is selling as this is selling for \$125 an acre, that the Government can not go to work and buy that and advertise the mature timber there for \$2 a thousand.

Mr. VOLSTEAD. How much privately owned land is there in the Yosemite Valley?

Mr. CURTIN. None whatever. That was granted to the State of California in 1864 and recorded by the State in 1905. There isn't a foot which can be sold; it is inalienable.

Mr. MONDELL. Have the two Secretaries been called upon to report, Mr. Raker?

Mr. RAKER. Yes, sir.

Mr. CURTIN. I understand from the Department of the Interior that they are going to ask Maj. Forsythe for his report. Mr. Mitchell, of the Forestry Department, himself last winter went over this situation.

Mr. RAKER. I want to ask you a question. This black line that runs south and that runs east and north, that takes it well away from the scenic beauty?

Mr. CURTIN. Yes, sir.

Mr. RAKER. And the one that comes west and north follows the top of the ridge?

Mr. CURTIN. No; the foot of the ridge.

Mr. RAKER. The foot of the ridge, and that is clear all around here, and hooks in on the west?

Mr. CURTIN. Yes, sir.

Mr. RAKER. And the water on the north which runs north and west?

Mr. CURTIN. There is the Tuolumne River.

Mr. RAKER. And this on the extreme east runs into Yosemite Creek and comes over the Yosemite Falls?

Mr. CURTIN. Yes, sir. Consider this rule promulgated by the Secretary relative to the national park, and made a part of the decision by the United States Supreme Court:

Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.

The Supreme Court said that they couldn't impose that condition upon us, who had bought our land and had received patents for it.

Mr. VOLSTEAD. That might be construed as a direction to their own officers to mark it.

Mr. CURTIN. The decision says:

We have assumed, so far, that Benson has exercised a power in accordance with the rules prescribed by the Secretary of the Interior. This, however, may be questioned. The orders of Benson are not that Curtin mark and define his lands, but that he do so "by an agreed understanding" with him (Benson), so that there could be no subsequent controversy about their boundaries. But this gives to Benson power to force a concession to "his understanding" and to require Curtin to submit to a limitation of the area of his land or a limitation of its uses. It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it.

Mr. MONDELL. Is that from the decision of the Supreme Court?

Mr. CURTIN. Yes, sir.

Mr. MONDELL. I think that ought to go into the record.

EXHIBIT A.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

J. B. CURTIN, APPELLANT, }
v. } No. 1. October term, 1911.
H. C. BENSON ET AL. }

[November 20, 1911.]

Mr. Justice McKENNA delivered the opinion of the Court:

This suit was brought in the superior court of Tuolumne County, State of California, against the appellee, Benson, and others, who were soldiers under Benson, to enjoin them from driving appellant's stock from his lands or by any means interfering with them, and from preventing appellant driving his stock to his lands over certain toll roads. The case was removed to the United States Circuit Court for the Northern District of California, where, after hearing, final judgment was rendered dismissing the bill of complaint.

The facts as agreed to, and established by evidence supplementing the agreement, are as follows: Appellant is the owner of certain lands within the Yosemite National

Park (the park was regularly and legally established, act Oct. 1, 1890, 26 Stat., 650, ch. 1263; Joint Res., June 11, 1906, 34 Stat., 831) and lessee of other lands therein. Leading to the lands there are certain toll roads, which were established many years prior to the creation of the park.

Appellee Benson is a captain in the United States Army and superintendent of the park, and, as such, it was and is his duty to enforce the rules and regulations prescribed by the Secretary of the Interior for the government of the park, and for this purpose he has a body of troops under his command.

The Secretary established and promulgated the following rules:

"9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.

"10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

Appellant claims the right, without complying with these rules, to drive his cattle over the toll roads and to graze them on his lands. On one occasion appellant placed cattle on his lands, and appellee Benson immediately removed them, and refused to allow them to be grazed thereon until appellant complied with the rules; and, prior to the commencement of the suit, refused to allow appellant to drive his cattle over the toll roads to his lands or to use the lands until he complied with the rules.

The testimony gave some particularity to the facts as agreed to. It appeared that appellant has within the park a few hundred acres and, it may be inferred, 23,000 acres in the vicinity. He asserted that he had not complied with the regulations, and did not intend to do so until required. And it was admitted that the largest part of the land was unfenced.

The following from the report of the superintendent of the park to the Secretary of the Interior for the year 1901 was put in evidence: "After due consideration, based upon the best evidence I have been able to obtain, I can see no objection to property owners and those holding leased land within the park limits grazing cattle near their own premises under the supervision of the park authorities."

Testimony was introduced on the part of appellees (their counsel expressing a doubt of its admissibility) "to show that the regulation is a reasonable one, and the reason for it, and what effect will be produced if the regulation is not carried out." To the offer counsel for appellant replied that he denied the power of the Secretary. "It is simply a question of his power," he said, and stated that if defeated on that point he could show that the rules were not reasonable under the circumstances. The court, saying that it understood, heard the evidence, which was to the following effect: Appellee Benson had been superintendent of the park since April 10, 1905, and on duty there for several years prior to that time. Numerous people claimed land in the park as their ranges, and a number of them had the places surrounded by fences, "sometimes inclosing, instead of 160 acres which they had, as high as several thousand acres of land." They drove their cattle to the so-called ranges and immediately let them loose, and they strayed throughout the entire reservation. "Senator Curtin's cattle have been in that condition for a great many years." This he (Benson) knew of his personal knowledge, because he was present at the time and had a correspondence with Mr. Curtin as far back as 1895, 1896, and 1897. He further testified that he was detailed on special duty to ascertain private land claims in the park, the object being to ascertain who owned land "and somewhere about where it lay;" that he did some surveying and found that a great many people—"Mr. Curtin, for instance"—had fenced more land than they were entitled to, had paid no attention to their own lines, had tracts of land inclosed upon which their cattle did not stay for more than three or four days, "but proceeded out to the rest of the park, so a regulation was ordered that they point out their metes and bounds, for this reason: though we might know absolutely where they were," they would claim the cattle to be on their lands. If the metes and bounds were fixed by an "agreed understanding" it could be definitely known whether they were within or without the claim. He further testified that the whole place had been overrun with cattle, and that the object of the regulations was "to keep people to the use of their own lands and keep the Government land from being interfered with." He did not attempt to prevent Curtin from using his land, provided he complied with the regulations, but he did remove cattle from Curtin's land on the ground that he had not complied with the regulations.

He testified further that he permitted Curtin to pasture his cattle on his land after he (Curtin) had it surveyed, but refused Curtin permission to fence according to the survey, the correctness of the survey being disputed.

It is objected by the Government that appellant is not entitled to the relief he prays because he does not come into court with clean hands. It is urged as a ground of the charge that the testimony exhibits his purpose to be to use his lands as a basis and the toll roads as a means to make wholesale trespasses upon the park lands. If the fact were established it might be hard to resist its effect, but it is not established. The evidence cited in support of it, and of which we have given the substance, refers to a period anterior to the time when this controversy arose. Indeed, anterior to the time when the regulations were established by the Secretary of the Interior, which was April 22, 1905, and the object of the testimony was to account for the regulations and not to show the special and immediate justification of Benson's orders. We can not now extend the evidence beyond the special and limited purpose of its introduction. We do not think the case, as it was submitted to the circuit court, showed the ulterior purpose on the part of appellant to be a willful trespass upon the lands of the park, but to be an honest assertion of rights.

On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the park not only rights of a proprietor but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land and the right of access to it are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.

A law requiring an owner in appellant's situation to fence his land might be within such power, though of that we are not required to express an opinion. A law making the trespass of his cattle on other lands a criminal offense might be within such power. Such laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it.

We have assumed so far that Benson has exercised a power in accordance with the rules prescribed by the Secretary of the Interior. This, however, may be questioned. The orders of Benson are not that Curtin mark and define his lands, but that he do so "by an agreed understanding" with him (Benson), so that there could be no subsequent controversy about their boundaries. But this gives to Benson power to force a concession to his "understanding" and to require Curtin to submit to a limitation of the area of his land or a limitation of its uses. It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it.

It may be doubted, too, if the rules prescribed by the Secretary of the Interior warranted Benson's order in regard to the toll roads. The rules did not deal with the toll roads at all. They do deal with "park lands" and authorize stock to be taken over them by the "written permission and under the supervision of the superintendent." But even if it be held to apply to the toll roads it is manifestly but a regulation of the transit of the stock merely and not a use of the roads as a condition of the performance of something else.

We, however, rest our decision on the ground of the want of power of the Secretary or the superintendent to limit the uses to which lands in the park held in private of ownership may be put.

Decree reversed and course remanded for further proceedings in accordance with this opinion.

MR. CURTIN. I thank you, gentlemen, for your attention. This is not in the interest of any private holdings or property.

THE CHAIRMAN. What is the determination by the committee of this matter?

MR. PICKETT. I suggest that we ask the Department of Agriculture and the Secretary of the Interior to write us their views on the matter, so that we can take it up and decide the matter promptly.

